

Rev. Rul. 89-50, I.R.B. 1989-15, 9, April 10, 1989.

ISSUE

Is the transfer to an individual retirement account (IRA) of amounts distributed from an annuity contract described in section 403(b) of the Internal Revenue Code a rollover contribution described in section 403(b)(8) if it includes amounts contributed by the employer in excess of the exclusion allowance under section 403(b)(2)?

FACTS

An employee of an employer described in section 501(c)(3) of the Code received a total distribution within the meaning of section 403(b)(8)(B)(ii) from an annuity contract described in section 403(b)(1). The distribution included contributions made by the employer that had not been excluded from the employee's gross income under section 403(b)(1) because they were in excess of the exclusion allowance of section 403(b)(2). The employee transferred the entire amount of the distribution into an IRA described in section 408 within 60 days of receipt. The annuity contract did not provide for deductible employee contributions under section 72(o).

LAW AND ANALYSIS

Section 403(b)(1) of the Code provides that if certain conditions are met, amounts contributed by an employer described in section 501(c)(3) and exempt from tax under section 501(a) to purchase an annuity contract for an employee shall be excluded from the employee's gross income to the extent such amounts do not exceed the applicable exclusion allowance.

Section 403(b)(8)(A) and (B) of the Code provides that a total distribution from an annuity contract described in section 403(b)(1) shall not be includible in an employee's gross income to the extent that it is transferred to an IRA or another annuity contract described in section 403(b)(1).

Section 403(b)(8)(C) of the Code provides that, for purposes of section 403(b)(8)(A), rules similar to those of section 402(a)(5)(B) shall apply. Under section 402(a)(5)(B), the maximum amount of any total distribution that may be transferred as a rollover contribution is the amount distributed reduced by the employee contributions (other than accumulated deductible employee contributions under section 72(o)).

Section 402(a)(5)(E)(ii) of the Code defines employee contributions for purposes of section 402(a)(5) as the amount considered contributed by the employee, determined by

applying section 72(f), less amounts previously distributed to the employee which were not includible in gross income. Section 72(f) provides that the amount of employer contributions includible in the gross income of the employee are considered employee contributions.

A total distribution from an annuity contract described in section 403(b)(1) of the Code is eligible for treatment as a rollover contribution described in section 403(b)(8) only to the extent that it does not exceed the amount received less employee contributions. Any amount transferred in excess of the limitation is not treated as a rollover contribution.

In this case, the amount transferred includes employer contributions that were includible in the employee's gross income and, therefore, pursuant to section 72(f) of the Code, considered employee contributions.

Under section 4973 of the Code, a six percent tax is imposed on the amounts transferred that are not eligible for rollover treatment, except to the extent that such amounts are allowable as contributions under section 408(a) or are distributed from the IRA in accordance with section 408(a)(4).

HOLDING

The portion of the distribution transferred to the IRA that was previously included in the employee's gross income is not a rollover contribution described in section 403(b)(8) of the Code. The fact that part of the amount transferred is not a rollover contribution does not affect the rollover treatment of the eligible portion of the transferred amounts.

DRAFTING INFORMATION

The principle author of this revenue ruling is Julie Jensen of the Employee Plans Technical and Actuarial Division. For further information regarding this revenue ruling, call the Employee Plans Technical and Actuarial taxpayer assistance telephone service between 1:30 and 4:00 p.m. Eastern Time, Monday through Friday, on (202) 566-6783 (not a toll-free call). Ms. Jensen's telephone number is (202) 343-0729 (also not a toll-free call).